Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Second Periodic Review of the	)	MB Docket No. 03-15
Commission's Rules and Policies	)	
Affecting the Conversion to	)	RM 9832
Digital Television	)	
	)	
Public Interest Obligations of TV	)	MM Docket No. 99-360
Broadcast Licensees	)	
	)	
Children's Television Obligations of	)	MM Docket No. 00-167
Digital Television Broadcasters	)	
	)	
Standardized and Enhanced Disclosure	)	
Requirements for Television Broadcast	)	MM Docket No. 00-168
Licensee Public Interest Obligations	)	

REPLY COMMENTS OF
COURTROOM TELEVISION NETWORK LLC

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TABLE OF CONTENTS

Page

EXECUTIVE SUMMARY ii

I. INCREASING MUST CARRY OBLIGATIONS WILL NOT SOLVE THE DTV EQUATION BUT WOULD REWARD BROADCASTERS FOR THEIR DILATORY APPROACH TO THE TRANSITION 2

II. INCREASING MUST CARRY OBLIGATIONS WOULD VIOLATE THE CONSTITUTION 8

A. Calls for Increased Digital Must Carry Obligations Are Clearly Content Based 12

B. The Disconnect Between Increased Must Digital Carry Obligations and Spurring the DTV Transition Renders Such an Approach Unconstitutional 14

C. Increasing Must Carry Obligations in the Name of Speeding the Digital Transition Would Not Pass Muster Under the *Turner* Decisions 17

1. Broadcasters' Continue to Improperly Focus on Capacity 17

2. Neither Dual Must Carry Nor Multicast Must Carry Satisfy the *Turner* Criteria 19

CONCLUSION 23

EXECUTIVE SUMMARY

The comments in this proceeding confirm that while some broadcasters still peg the speed of the digital transition to must carry rights, and in particular to dual carriage and multicast must carry models the FCC has already rejected, digital must carry is not the lynchpin of the transition. Notably, some broadcasters continue to push for these models in the name of the transition, but at the same time refuse to expend effort or resources to bring about the transition so long as there remains even an outside chance the FCC will reverse course. Consequently, one of the surest ways for the FCC to aid the transition would be affirming that dual must carry would violate the First Amendment, and that broadcasters are entitled to carriage of only a single program stream comprised of their "primary" video.

The very commencement of this proceeding demonstrates, and the comments confirm, that many issues must be resolved before the FCC can even begin the constitutionally required analysis of digital must carry's burdens and benefits. The comments, including those by broadcasters advocating maximum must carry rights, set out a litany of other issues that must first be resolved before additional must carry can obligations be broached, and most commenters in fact fail to even mention must carry as a significant factor in the DTV transition. Multicast must-carry is thus anything but a regulatory option with significant potential to move the transition forward quickly.

Nor is it accurate for broadcasters to suggest that cable providers should be saddled with additional must-carry obligations because they are not helping to

facilitate the DTV transition. To the contrary, the cable industry is doing its part to address the "wild card" in the DTV transition – consumer acceptance. It has invested more than $70 billion to create additional network capacity, which many systems have dedicated and/or are using to deliver high definition and digital programming. Meanwhile, the consumer electronics industry reports that, despite available DTV products, lack of digital broadcasts is hindering consumer demand, and that most stations that have launched digital signals broadcast at less than full power, depriving consumers of digital content. In fact, electronics manufacturers report that aggregate cable and satellite HDTV programming, excluding retransmitted broadcast signals, outpaces broadcast six-to-one.

Even in the face of this disparity, some broadcasters remain more interested in government subsidies in the form of extra must carry rights than in assuming responsibility for the transition's success, or helping to build consumer demand to facilitate it. The lack of activity to promote over-the-air broadcasting, and increasing desire by consumers to receive programming from services like cable and satellite, raise fundamental question of why broadcasters receive favored treatment compared to other media.

In this regard, comments confirm that imposing either dual or multicast must carry in the name of the speeding the transition would violate not only cable operator First Amendment rights, but notions of fundamental fairness in the market for video programming. As a threshold matter, none of the broadcasters calling for additional must carry rights even try to address these failings, and all ignore the constitutional

criteria that must be satisfied to impose any must carry mandates. Some broadcasters also completely disregard the First Amendment rights of cable operators, positing that the only thing that matters is that broadcasters get the regulatory favors they seek.

Aside from these shortcomings, nothing in the broadcasters' comments helps their case under the First Amendment. Their demand for additional must carry rights clearly rests on content-based preferences, which immediately distinguishes the new rights they seek from analog regulations the Supreme Court narrowly upheld. Dual carriage and multicast must carry also fail to pass constitutional muster because the only interests the broadcasters advance – speeding the DTV transition and benefiting broadcasters' bottom lines – cannot legitimately be substituted for the must carry interests Congress identified and the Supreme Court relied upon with respect to the original must carry requirements.

Dual carriage and multicast must carry also cannot withstand constitutional scrutiny because broadcasters continue to focus solely on the amount of cable system capacity that must carry may require. This ignores the fact that, for every cable channel occupied by broadcasters under a government mandate, that is one less channel over which cable operator have editorial control and for which other program providers may compete. This burden cannot be answered simply by pointing to the one-third channel cap in the Act's must carry provisions, and it can be imposed consistent with the Constitution only if consistent with the goals Congress set out when it originally imposed must carry requirements.

The comments provide further evidence that broadcasters cannot make this showing. Multicasting is an wholly new business opportunity, so requiring must carry to make it is an "attractive business plan" (in the words of one broadcast commenter) does nothing to sustain traditional free over-the-air service that must carry is intended to support. In fact, allowing broadcasters to multicast gives them options *other than* government-imposed intrusions onto the cable industry's First Amendment rights to support continued commercial viability of over-the-air broadcasting. Moreover, giving broadcasters additional cable channels for multicast programs, in addition to the existing guarantee for one program stream, would be profoundly unfair and in direct counterpoint to the pro-competitive criterion the Supreme Court cited.

There is no market failure as to multicast broadcast signals for the FCC to correct, as broadcasters have the same opportunity to produce compelling programming and garner carriage by building consumer demand as any other programmer. If anything, broadcasters armed with must carry and retransmission consent rights already have all the bargaining power they need. There is no need – nor a constitutionally supportable reason – to supplement that power at the expense of nonbroadcast programmers.

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REPLY COMMENTS OF COURTROOM TELEVISION NETWORK LLC

Courtroom Television Network LLC ("Court TV") hereby replies to the comments submitted in response to the Notice of Proposed Rulemaking in the captioned proceeding. 1/ Court TV filed comments in this proceeding, though it does not directly involve digital must carry but focuses instead on broadcasters' evolution from analog to digital service, because must carry issues continue to be inappropriately linked to the DTV transition. The comments in this proceeding confirm that while some broadcasters continue to peg the speed of the transition to digital must carry, and to must carry

1/ *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 18 FCC Rcd 1962 (2003) ("*Notice*").

regimes the Commission has already rejected in particular, digital must carry is simply not the ready solution or a panacea for the DTV transition. The comments also demonstrate that imposing either dual or multicast must carry in the name of the speeding the DTV transition would violate not only cable operators' First Amendment rights, but notions of fundamental fairness in the market for video programming services as well.

Nevertheless, some broadcasters continue to push for dual or multicast must carry in the name of the DTV transition, while at the same time refusing to expend additional effort or resources towards meeting their obligations so long as there remains even a glimmer of hope the FCC will reverse course on those issues. Consequently, Court TV submits the surest way the FCC can aid the digital transition with respect to must carry is to affirm its conclusions that dual must carry would violate the First Amendment, and that broadcasters are entitled to carriage of only a single programming stream comprising their "primary" video, in digital or analog format at their election. Only by definitively dispossessing broadcasters of the notion that they may rely on regulatory largesse for the success of digital broadcasting, and spurring them to look for ways to bring about that success on their own, can digital must carry play a valuable role in the DTV transition.

I. INCREASING MUST CARRY OBLIGATIONS WILL NOT SOLVE THE DTV EQUATION BUT WOULD REWARD BROADCASTERS FOR THEIR DILATORY APPROACH TO THE TRANSITION

The very commencement of this proceeding demonstrates, and the comments responding to the NPRM confirm, that not only is digital must carry not the lynchpin of

the DTV transition, but many issues must be resolved before the FCC can even begin the required analysis of digital must carry's burdens and benefits. The Commission has already determined – correctly, on sound legal reasoning – that requiring dual carriage would violate the First Amendment and that a broadcaster's 'primary video' entitled to carriage means a single program stream. Court TV at 5 (citing *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, ¶¶ 12, 57 (2001) ("*Digital Must Carry Order*")). *See also* Comments of A&E Television Networks ("AETN") at 5-7. There is no need to revisit these conclusions in the name of spurring the digital transition.

Rather, the Commission must focus instead on matters that will have a much more direct impact on the transition. In its initial comments, Court TV pointed out the many DTV issues that must be addressed before the digital transition can truly take root, and showed that they both marginalize the role digital must carry can play and create a "chicken and egg" problem for assessing its constitutionality. Court TV at 7-8. The comments confirm the accuracy of these observations. Most of the comments do so by failing to even mention digital must carry as a significant factor in the transition. Others do so by referencing must carry only in passing. The Association for Maximum Service Television ("MSTV") and National Association of Broadcasters ("NAB"), for example, relegate must carry to a single paragraph at the back of their nearly 40-page joint comments, listing it as merely one of several "continuing challenges" the FCC should also examine. MSTV/NAB at 34. At the same time, they observe the transition "remains a complex process with some of the most critical and difficult issues still to be

addressed," with "the most challenging" being "the rules to govern the creation of the post-transition DTV table." *Id*. at 3. They also note the important role to be played by "[c]hannel election policies, use-it-or-lose-it replication and maximization policies, and implementation of the statutory provisions regarding the DTV transition deadline," not to mention issues involving "coverage and interference" and "the impact of the repacking process on existing DTV replication or maximized service" as well. *Id*. at 2. *See also* Comments of Sinclair Broadcasting Group, Inc. ("Sinclair"), Section II (cataloging "Difficulties in the Transition Process"). *Cf.* National Cable & Telecommunications Association ("NCTA") at 12 (agreeing that "[o]ther pieces of the puzzle – which have nothing to do with cable – have to be in place before cable carriage" can have any significant impact).

It is thus simply not the case, as yet other broadcasters claim, that "multicast must-carry is the regulatory option with the greatest potential to move the transition forward quickly." Paxson at 10. Nor is it the case that multicasting, supported by government-enforced carriage of it on cable systems, is a "key" to the digital transition "that will help drive the success of DTV broadcasting during the transition and afterward." *Id*. at 9. Though some broadcasters cite an "unquestioned link between a transitional must-carry regime and the pace of the DTV transition," Harris Corp. at 3-4, they offer no evidentiary support for the proposition, and they fail to recognize the many other factors that will have a more direct impact on the speed of the transition.

Broadcasters that continue pin their hopes and condition support for the DTV transition on government-provided guarantees of dissemination of their programming via cable claim that cable providers should be saddled with this burden because, unlike broadcasters, they are not doing their part to facilitate the transition. *E.g.*, Paxson at 4 ("Cable operators … in reality, have done nothing to further the DTV transition."). But this is simply not the case. Court TV has noted that consumer adoption of the new technology remains a "wild card" in the transition, Court TV at 3, and the comments confirm both that this is the case, and that the cable industry is doing its part to address it. For example, a significant portion of the comments of the Consumer Electronics Association ("CEA") catalogs the efforts to make DTV available to the public while at the same time noting "despite the availability of DTV consumer products, the lack of digital broadcasts hinders consumer demand." *See generally* CEA Comments at 3-13. NCTA points out that "[c]able operators have invested more than $70 billion to create additional network capacity for … digital services" and that "[m]any cable operators have earmarked – and are already using – part of their new digital spectrum to bring high definition and digital programming to consumers … throughout the United States." NCTA at 1-2. *Compare* CEA at 2 ("the majority of stations that have launched their digital signal are broadcasting at less than full power, depriving much of their audience access to digital content").

Rather than "hav[ing] nothing to do with the DTV transition," Paxson at 2, these significant efforts are precisely the kind endeavors that will help build consumer

demand for digital services, which in turn will spur the DTV transition. Nevertheless some broadcasters implore the Commission to "ensure that each segment of the video delivery industry is carrying its own weight in making the transition a success," *id*. at 2, even though the record reflects that they would do best to look inward before asking that the government impose obligations on others. *See*, *e.g.*, CEA at 11 ("Broadcasters, both as a group and individually … are not doing enough to promote the use of antennas to receive over-the-air broadcast signals.") (footnote omitted). CEA notes that "the weekly aggregate hours of reported cable and satellite HDTV programming is 784 hours, excluding any retransmission of broadcast digital signals," while the "comparable figure for broadcast HDTV programming is only 119 hours, of which 56 hours originate with PBS." CEA at 10. This data, along with the cable industry's significant investments, strongly suggest that other industry segments are well ahead of broadcasters in attempting to build the consumer demand that will drive the DTV transition.

This has not stopped broadcasters from continuing to demand regulatory preferences, however. Paxson, for example, speaks terms of "broadcasters' rightful expectancy" to preferential treatment and the "accompanying advertising revenue," Paxson at 6, and demands "regulatory treatment that makes multicasting an attractive business plan." *Id*. at 7. Broadcasters also continue to push, as noted, for multicast must carry as the answer to all their problems. *See supra* at 4 (citing Paxson at 9-10). *See also* National Minority T.V., Inc., *passim*; Capitol Broadcasting Company, Inc. at 9.

The record reflects that some broadcasters are more interested in securing still more guarantees of government subsidies in the form of increased must carry obligations than they are in assuming responsibility for the transition's success or helping build consumer demand that will facilitate that objective. 2/ For example, one broadcaster all but conditions continued DTV efforts on the assurance of a spot on cable systems that no other programmers enjoy. National Minority T.V. at 1-2 ("broadcast stations have little incentive to accelerate their transition to digital unless the Commission requires cable systems to carry digital broadcast signals"). In a similar vein, there is significant merit in observations that "[t]he decision of some broadcasters to withhold consent for cable carriage of their digital signals … lays bare the claim that cable systems are acting as 'gatekeepers' who are somehow preventing broadcasters' [ ] programming from reaching cable consumers." NCTA at 9 (footnote and citation omitted). The broadcasters' stance is the kind of position that lead other commenters to suggest "the broadcasters' focus appears to be on obtaining federal mandates to require other transmission services (satellite and cable) to carry their signals," CEA at 11, and to chide broadcasters for "increasingly relying on federal mandates on others to ensure their commercial success." *Id*. at 12.

2/ *See*, *e.g.*, AETN at 13 ("multicast must carry rules would only serve to enhance the many regulatory advantages broadcasters have already enjoyed, including that fact that they have received free spectrum and guaranteed carriage, and they are, unlike cable programmers, freed from the prospect of having to pay for carriage should they ever have to compete for it.") (citing 47 U.S.C. § 534(b)(10)).

All told, it is clear "cable carriage of digital broadcast signals is not the key to ending the transition," NCTA at 12, and there is accordingly no merit to the assertion that "requiring cable systems and other MVPDs to carry the signals of all DTV broadcast stations … is a condition precedent to a proper resolution of the issues in this rulemaking." WDLP Broadcasting, Co., LLC ("WDLP") at 3. Quite to the contrary, "the lack of activity in promoting over-the-air broadcasting and the increasing desire of consumers to receive their video programming from paid services like cable and satellite raise fundamental questions as to why broadcasters receive favored treatment compared to other media." CEA at 12. As Court TV has demonstrated in the past, 3/ and as it continues to show below, neither the Constitution nor the ideal of a properly functioning market for video programming delivery can support such a preference, or the broadcasters' attendant call for dual or multicast must carry.

II. INCREASING MUST CARRY OBLIGATIONS WOULD VIOLATE THE CONSTITUTION

The comments confirm that neither dual carriage of analog and digital signals nor mandatory carriage of multicast digital signals are consistent with the First Amendment. *See* Court TV, Section II. Nothing in the comments contradicts that under any must carry regime, including dual carriage or multicast must carry, "[b]roadcasters,

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3/ Court TV at Section II. *See also*, *e.g.*, Comments of Court TV in CS Docket No. 98-120, filed June 11, 2001, at 7-19 ("Court TV Digital Must Carry Comments"); Reply Comments of Court TV in CS Docket No. 98-120, filed August 16, 2001, at 21-27.

which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored." *Turner Broad. Sys., Inc. v.* FCC, 512 U.S. 622, 645 (1994) ("*Turner I*"). Nor does any commenter contradict that any digital must carry obligation, including dual carriage or multicast must carry, must materially advance important government interests unrelated to suppressing speech – specifically, preserving free over-the-air broadcasting, facilitating dissemination of information from a multiplicity of sources, and promoting fair competition – while not burdening substantially more speech than necessary to do so. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*").

Dual carriage and multicast must carry fail to satisfy these requirements for a variety of reasons. First, broadcaster demands for these increased carriage obligations are clearly content-based. Second, the only reason offered for imposing that burden – spurring the DTV transition – cannot replace the government interests the Supreme Court identified in *Turner* in narrowly upholding analog must carry. Finally, imposing increased must carry obligations on cable providers would not advance the interests specified in *Turner* because the increased obligations would burden substantially more cable operator speech than is permissible, and would blatantly favor broadcasters over other programming providers to the detriment of competition

Not surprisingly, none of the broadcasters calling for additional digital must carry rights even try to address these failings. In fact, all but one broadcast commenter demanding additional cable carriage guarantees complete ignore the stringent constitu-

tional requirements that must be satisfied to impose any must carry mandate. 4/ Worse, some broadcasters display stunningly little sensitivity for the First Amendment rights of cable operators, even in the face of the recognition that must carry "extracts a serious First Amendment price" by "interfering with the protected interests of cable operators to choose their own programming; [preventing] displaced cable program providers from obtaining an audience; and [preventing] some cable viewers from watching … their preferred set of programs." *Turner II*, 520 U.S. at 226 (Breyer, J., concurring).

This contempt for the constitutional rights of other industry segments is particularly striking when broadcasters seek to have the FCC ignore cable operator First Amendment rights for the benefit of broadcasters, while espousing that the agency may not meddle in broadcasters' editorial discretion. Paxson demands that cable operators be forced to carry all of a broadcasters' multicast signals, which Paxson touts as offering "unique access to minority, religious and special interest" programming, Paxson at 8,

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4/ *See*, *e.g.*, Paxson at 9-14; MSTV/NAB at 34; Harris Corp. at 3-4; National Minority T.V., *passim*; Capitol Broadcasting at 9; WDLP at 2-3. In fact, Paxson spends page after page on its "PCC multicast must-carry plan" without once acknowledging the incursion on cable operator and cable programmer First Amendment rights. *See* Paxson at 4-14, 44. Even the lone commenter acknowledging the *Turner* requirements, the Association of Public Television Stations, Corporation for Public Broadcasting and Public Broadcasting Service ("Public Broadcasters"), does little more than list the criteria then baldly assert that they are met "without question" because multicast must carry will allegedly "propel the digital broadcast transition." Public Broadcasters at 19. There is no showing that the purported advance in the DTV transition will actually occur, and commenters merely assert that "full multicast carriage rules raise *no serious constitutional questions*." *Id*. at 20. *Compare*, *infra* at 12-23.

but in the next breath insists "broadcasters who choose to multicast should not be required to air specified amounts of … public interest programming." *Id*. at 9. Even more astounding is Paxson's call for "regulatory treatment that makes multicasting an attractive business plan" *id*. at 7, while at the same time demanding respect for "broadcasters' First Amendment right [*sic*] to program their stations freely, without government censure or intervention." *Id*. at 37.

This hypocritical approach to the First Amendment goes hand-in-hand with Paxson's call for the Commission to all but ignore the cable industry's constitutional rights. Paxson suggests that the Commission can overlook the burden that must carry imposes because such obligations were "designed to protect broadcasters and consumers, not cable operators." *Id*. at 11. Paxson's placement of broadcasters before consumers is particularly telling giving its exhortation that "[t]he Commission has no mandate … to protect consumers' cable channel options." *Id*. at 12. All this leaves, of course, is the demand that the FCC cater broadcaster interests and wellbeing, which is reaffirmed in Paxson's callous dismissal of "[c]able operators' business decision [*sic*] regarding the structure of their service." 5/ Fortunately, the First Amendment, the

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5/ *Id*. Paxson's avarice is apparently without limit, as it views cable operator efforts to expand their capacities, and with it the ability to offer digital programming that will help build demand for DTV and spur the digital transition, entirely in terms of what it means broadcasters may seek to claim. *See id*. at 11 ("only relevance that cable operators' digital upgrades … have to the DTV transition is … vastly expanded channel capacity also … vastly expand[s] the number of channels available for must-carry").

Supreme Court's decision in the *Turner* cases, and this Commission's obligation to fully weigh the constitutional implications of its actions prevent the complete disregard of cable operator rights that some broadcasters advocate.

A. Calls for Increased Digital Must Carry Obligations Are Clearly Content Based

Though the Supreme Court narrowly upheld analog must-carry based in part on finding it "does not distinguish favored speech from disfavored speech on the basis of the ideas or views expressed … but is a content- neutral regulation, " 6/ it is clear that the same is not true of the additional must carry rights broadcasters now seek. Paxson touts multicasting, which it insists should be supported by mandatory carriage obligations, as being able to offer "unique access to minority, religious and special interest groups." Paxson. at 8. In addition, Paxson's call for maximum must carry rights rests in large part on its self-asserted ability to offer what it calls "a much need alternative to the steady stream of sex, violence, and vulgarity" it alleges are "offered by many other programmers." *Id*. at 2. These are clearly content-based preferences. So to is Paxson's claim that "multicasting promises to open up … opportunities for local programming that serves the needs of niche audiences." *Id*. at 33.

Paxson also would have the FCC disregard "consumers' cable-channel options" in favor of the alleged "expanded potential for increased local-interest,

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6/ *Turner II*, 520 U.S. at 186 (citing *Turner I*, 512 U.S. at 643, 649) (internal quotation omitted).

children's, and community-service programming offered by multicasting." *Id*. at 12. Remarkably, Paxson would simply have the FCC substitute this programming that Paxson elevates to preferred status for other offerings by cable programmers, by urging the Commission to simply "not assume that fewer available cable channels will degrade cable customers' service." *Id*.

Putting aside whether Paxson (or the Commission, for that matter) should dictate what appears on television rather than leaving it to consumer preferences and market demands, 7/ the Supreme Court has already made patently clear the type of programming substitution Paxson advocates raises serious constitutional issues. In *Turner II*, the Court recognized must carry "interferes with … cable operators [ability] to choose their own programming," and that it "prevents displaced cable program providers from obtaining an audience," and "prevents some cable viewers from watching … their preferred set of programs." 520 U.S. at 226 (Breyer, J., concurring). The Court also made clear that if this displacement of cable operator editorial control and "disfavored" programming were content based, the rules could not survive constitutional scrutiny. *Id*. at 225 (Stevens, J. concurring) ("If [must carry] regulated the content of speech … our task would be quite different."). Given that broadcasters seek full must

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7/ Perhaps most chilling in Paxson's misguided effort to have the Commission control what the American public sees and hears is its fervent belief that such government intrusion into programming choices, "if given the chance," will lead "the market [to] demand that large media owners live up to the same standard." Paxson at 33.

carry rights for multicast offerings, based on the alleged content benefits the additional channels might convey, the Commission has no choice but to reject their demands.

B. The Disconnect Between Increased Must Digital Carry Obligations and Spurring the DTV Transition Renders Such an Approach Unconstitutional

The comments make clear that broadcasters seek an FCC mandate for dual carriage and/or multicast must carry for reasons having nothing to do with the interests Congress set forth, and the Supreme Court relied upon, to support must carry as a constitutional endeavor. *See Turner II*, 520 U.S. at 189. Only one commenter even mentions these interests, and even then rushes to substitute the goal of speeding the DTV transition in their place. Public Broadcasters at 19. *See also*, *e.g.*, National Minority T.V. at 2-3 (broadcasters "will expend capital on the DTV transition more quickly and willingly if they know that such investment is accompanied by cable carriage of their DTV signals"). Given that the Supreme Court has held it impermissible to "supplant the precise interests put forward by the State" in assessing the constitutionality of government regimes that implicate protected speech, *Edenfield v. Fane*, 507 U.S. 761, 768 (1993), which is clearly the case with must carry, *see Turner I*, 512 at 636 ("There can be no disagreement on [the] initial premise [that] [c]able programmers and cable operators engage in and transmit speech … entitled to the protection of … the First Amendment"), the broadcasters' case is fatally flawed. *See also Turner II*, 520 U.S. at 190-191 (refusing to include in constitutional review any rationale "inconsistent with Congress' stated interests in enacting must carry"); *cf.*, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434

(D.C. Cir. 1985); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (refusing to sanction must carry absent congressional findings).

The proponents of dual carriage and multicast must carry make clear their advocacy of additional must carry obligations has nothing to do with preserving free over-the-air broadcasting, facilitating dissemination of ideas from a multiplicity of sources, or promoting fair competition. For example, Paxson makes multicast proposals and related must carry demands in furtherance of its desire to "*expand* current levels of over-the-air service," to offer "*subscription* services such as datacasting and video on demand," "launch exciting *new* program offerings," and to "gain access to the eyeballs necessary to launch *new* services." Paxson at 4, 8, 13 (emphases added). Clearly these interests have nothing to do with *preserving* any kind of programming, or ensuring the availability of *free* over-the-air broadcasting. Paxson also cites multicasting's ability to "provide unique access to minority, religious and special interest" programming, to secure "additional revenue streams," and to facilitate "local-interest, children's, and community-interest programming," *id*. 8, 12, none of which is directed toward any of the three *Turner* must carry interests.

The same is true of "sav[ing] the Commission resources and expedit[ing] the auction of analog spectrum." National Minority T.V. at 3. Similarly, "providing broadcasters with the flexibility to optimize their utilization of digital technology to enrich the quality of programming they offer," Harris Corp. at 3, was never a goal of the Act's must carry provisions. As a threshold matter, this is something broadcasters should be

pursuing on their own steam, not on the backs of cable and satellite operators or at the expense of other programmers. In any event, the Act's must carry provisions were designed to precluded "bottleneck monopoly power exercised by cable operators," *Turner I*, 512 U.S. at 661, not to create new and different business opportunities for broadcasters.

That multicasting is intended to give broadcasters new opportunities, and not to merely bolster the traditional programming toward which the must carry provisions of the Act are directed, was recently reinforced in *Office of Communication, Inc. of the United Church of Christ v. FCC*, __ F.3d ___, 2003 WL 21032901 (D.C. Cir. May 10, 2003). In that case, the D.C. Circuit confirms that "ancillary and supplemental services such as subscription television" enabled by the right to multicast allows entirely "new … opportunities" that are wholly different from the "primary operation of … free over-the-air television broadcast service." *Id*. *1, *6, *7. The court recognized multicasting as going beyond the "primary use" of broadcast channels, *id*. at *1, and accordingly removed any doubt whether such operation constitutes traditional broadcasting Congress intended must carry to protect, as opposed to something wholly new and different that has the same opportunity to succeed in the market as other program offerings.

C. Increasing Must Carry Obligations in the Name of Speeding the Digital Transition Would Not Pass Muster Under the *Turner* Decisions

The Commission's decisions to not require cable operators to carry both a broadcaster's analog and digital signals during the digital transition, and that the "primary video" entitled to carriage consists of one program stream, 8/ is anything but "an ill-advised and unnecessarily narrow reading of a federal statute." Public Broadcasters at 20. Rather, they are constitutionally compelled determinations that give due regard to the incursion on cable speech that must carry entails, and that reflect the inability of dual or multicast must carry to satisfy the *Turner* criteria. The Commission should adhere to its well-supported approach.

1. Broadcasters' Continue to Improperly Focus on Capacity

One of the principal shortcomings in broadcaster demands for additional must carry rights has always been their insistence on viewing the issue solely through the lens of cable system capacity. *See* Court TV at 4-5, 17-19. Their comments in this proceeding maintain this myopic view of the issue. *See* Public Broadcasters at 18-19; *id*. at 21 ("carriage of the full broadcast DTV signal [including all multicast channels, if any] would occupy only one-half the capacity of a digital cable system channel"); Paxson at 11. Consequently, the broadcasters have no real answer – other than pointing

8/ *Digital Must Carry Order*, 16 FCC Rcd 2695, ¶¶ 12, 57.

to the percent of cable capacity they say they will use – for the fact that multicast must carry burdens substantially more cable speech than is permissible.

Broadcasters continue to have no answer for the fact that additional carriage "extracts a serious First Amendment price" because it "interferes with the protected interests of cable operators to choose their own programming." *Turner II*, 520 U.S. at 226 (Breyer, J., concurring). In fact, they are notably silent on the point that the relevant inquiry in examining multicast must carry is not how much capacity that would be devoted to broadcast channels compared to analog must carry, but rather the extent to which increasing the channels reserved for broadcasters disadvantages non-broadcast channels. In the face of this reality, the broadcasters' only argument is that the Commission simply "should not assume fewer available channels will degrade cable customers' service." Paxson at 12. The Commission may not override the burden on cable operator and programmer speech by casually pretending it does not exist.

Paxson's suggestion that any carriage obligation is permissible so long as it requires no more than a third of a cable system's capacity is unsupported by legal analysis and is constitutionally unsound. *See* Paxson at 11 (arguing "[t]he only relevance that cable operators' digital upgrades have" is "expanded … channels available for must-carry stations" and that "cable operators … are already amply protected by the one-third channel capacity cap"). The one-third cap does not mean that the Commission can impose any must carry obligation it wishes, in derogation of cable operators' editorial control, but rather stands as the maximum incursion

that is allowed, *provided the imposition otherwise comports with constitutional analyses* required under *Turner*.

Even if cable system capacity were the measure for whether multicast must carry can withstand scrutiny, there is substantial doubt the additional burden could pass muster. The American Cable Association ("ACA") reports that "[s]mall cable operators are especially threatened by broadcasters' continuing call for mandated dual must-carry." ACA at 6. *See also* NCTA at 18 ("requiring cable carriage of all digital broadcast signals … would simply require the consumption of limited cable capacity, denying consumers the choice of new programming"). Ironically, part of the problem is caused by rights to demand carriage that broadcasters already possess. *Id*. at 6-7 ("Retransmission consent tying arrangements lock up what little bandwidth is available even on upgraded systems."). The Commission accordingly cannot blindly accept broadcaster claims that there is ample capacity to meet their demands for increase must carry requirements.

2. Neither Dual Must Carry Nor Multicast Must Carry Satisfy the *Turner* Criteria

Neither dual carriage nor multicast must carry requirements would do anything to preserve free over-the-air broadcasting, ensure dissemination of information from a multiplicity of sources, or promote competition. *See Turner II*, 520 U.S. at 189. Because none of the commenters in this proceeding bother to address these criteria, though some continue to seek enhanced must carry rights, *see supra* at 3-6, the showing by Court TV and others that dual carriage and multicast must carry do not pass consti-

tutional muster is left virtually unrefuted. *See* Court TV at 10-23; AETN at 7-13. The present record is illuminating, however, with respect to extent it reveals dual carriage and multicast must carry will not only not promote competition, but would actually severely undermine that vital interest.

Court TV starts from the premise, as it has in the past, that simply because a regulation would help broadcasters does not mean it will advance the *Turner* interests. *Compare* Paxson at 7 (seeking "regulatory treatment that makes multicasting an attractive business plan"). That axiom remains true even as broadcasters continue to lobby for increased must carry rights. That multicasting may well help the long-term business plans of broadcasters, does not make it constitutional to force cable operators to carry extra broadcast signals at the expense of editorial control over their own systems, or of the ability to carry other programmers who do not enjoy guaranteed access and must compete in the market. *See* NCTA at 18 ("requiring cable carriage of all digital broadcast signals … would … deny[ ] consumers the choice of new programming"). Court TV notes in this regard the extensive efforts it must put into securing cable carriage. *See* Court TV at 20-21 (detailing need to produce compelling programming, offer financial incentives, and in some case make direct payments, to secure carriage on cable systems). Granting broadcasters additional carriage rights does not enhance a level playing field between them and programmers like Court TV, but rather only "remove[s] any incentive that broadcasters might have to create more high definition [or other] high-value digital content to prompt carriage." NCTA at 18.

Paxson posits that multicasting could make over-the-air broadcasting a "much-needed multi-channel competitor to the cable and satellite delivery platforms." Paxson at 7. But first, Paxson argues, cable and satellite should jump-start the ability of over-the-air broadcasting to be a multi-channel competitor by being forced to carry each multicast broadcast channel until multicast broadcasting builds enough of critical mass to become a competitor in its own right. *Id*. at 10-13. This is not the way properly functioning markets are intended to operate, and neither cable nor satellite enjoyed such a regulatory jumpstart – and certainly not at the expense of their competitors – to ensure their viability.

More important, "ensuring regulatory treatment that makes multicasting an attractive business plan," Paxson at 7, was never one of the interests the Act's must carry provisions was intended to serve. This renders broadcaster demands to stand on their competitors' shoulders to ensure success of new broadcast business opportunities wholly inconsistent with the constitutional interests recognized in the *Turner* decisions. Indeed, relieving broadcasters of competitive pressures in pursuing the new business opportunities presented by multicasting, while programmers like Court TV must struggle to compete, is patently unfair and "a fundamentally backwards way of achieving the broadcasters' digital transition." NCTA at 18.

The recent decision in *United Church of Christ* confirms that, with respect to multicasting, broadcasters have already been provided the means to ensure the success of DTV apart from mandatory carriage guarantees. In that case, the D.C. Circuit recog-

nized that broadcasters were provided "greater flexibility to obtain money to pay for the transition to digital broadcasting" by being given the freedom to multicast. 2003 WL 21032901 at *6. This included the ability to offer "ancillary and supplemental services such as subscription television" and even encompassed allowing noncommercial broadcasters the ability to pursue income streams to assure the viability of their primary program service. 9/

There is thus no merit to the Public Broadcasters' supposition that multicast must carry is "necessary to rectify a market failure," due to "largely unsuccessful efforts by public broadcasters to negotiate for full and fair voluntary cable carriage." Public Broadcasters at 21. Roughly translated, the Public Broadcasters are complaining that they have been unable to persuade cable operators to give each public broadcaster multiple channels for public broadcaster programming. Meanwhile, other broadcasters, whose programming is more highly valued by the public, have been able to parlay that demand into not just carriage for that programming, but additional channels for unrelated programming. *See* ACA at 6 ("Retransmission consent tying arrangements lock up … bandwidth … even on upgraded systems."). This is not a "market failure"

9/ In this regard, *United Church of Christ* also provides additional support for the Commission's decision that a broadcaster's "primary video" entitled to mandatory carriage consists of a single program stream and related program material. *See Digital Must Carry Order*, 16 FCC Rcd 2596, ¶ 57. The court distinguishes between "primary operation" of broadcast stations, as consisting of "one free over-the-air television broadcast service," with "ancillary and supplemental services" offered over the remaining capacity. 2003 WL 21032901 at *1, *6.

by any stretch of the imagination. Rather, it comes closer to how a market is supposed to work – with the most highly demanded goods and services receiving the widest dissemination – than any other model that still relies in part on government-imposed compelled carriage mandates. 10/ As it stands, each broadcaster is guaranteed cable carriage of at least one program stream, with the ability to obtain carriage of additional programming streams if there is sufficient public demand to persuade cable operators to carry them. Guaranteeing public broadcasters – or any broadcaster, for that matter – anything more would not be correction of a "market failure." It would be market interference by the government to favor some programmers over others. Such interference is a far cry from "promoting fair competition in the market for television programming." *Turner II*, 520 at 189.

CONCLUSION

It was no mere Freudian slip for broadcasters to refer in this proceeding to DTV must carry as "the single greatest weapon" the Commission has at its disposal. Paxson at 4. Every must carry obligation "that creates [a] guarantee [of dissemination of broadcast programming] extracts a serious First Amendment price." *Turner II*, 520 U.S. at 226 (Breyer, J., concurring). Wielded improperly, this "weapon" unlawfully usurps cable operator editorial control over their systems, overrides the natural

10/ Ideally, true market protections would preclude the retransmission consent tying abuses that persist.

operation of supply and demand in filling out cable line-ups, and ultimately denies disfavored nonbroadcasters who might otherwise be carried an opportunity to reach an audience. In the case of dual carriage and multicast must carry, these burdens would be imposed without advancing any of the relevant interests underlying the Act's must carry provisions. Accordingly, the Commission should reaffirm its conclusions not to adopt a dual carriage requirement for the DTV transition, and that broadcasters are entitled to carriage of only their "primary" digital signal consisting of one video stream.

Respectfully submitted,

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